Mohd Syaakir Badri bin Mohd Noor & Anor v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42S-18–04 OF 2014
CHAN JIT LI JC
31 DECEMBER 2018

Criminal Law — Appeal — Appeal against conviction and sentence — Whether trial judge made appealable error — Whether lower court bound by stare decisis on decision made by High Court that there was a prima facie case — Failure to raise case of the defence during prosecution stage — Dangerous Drugs Act 1952 ss 12(2) & 39A(2) — Penal Code s 34

This was the appellants' appeal against the sentence and conviction imposed by the sessions court. The appellants were charged for an offence under s 12(2) of the Dangerous Drugs Act 1952 ('the DDA') which was punishable under s 39A(2) of the same act and read together with s 34 of the Penal Code. The appellants were initially acquitted by the first sessions court judge to which the prosecution appealed, the High Court had overturned the decision of the sessions court and ordered that the prosecution had proven a prima facie case and the appellants were ordered to enter their defence. The facts of the case were that SP1 led a raiding team. SP1 had received information that two male Malays were involved in drug activities to which the suspects were using a car bearing registration No KAX 4173 ('the said car'). Acting on the information received, the raiding team travelled to the scene in three cars. The raiding team located the said car parked and directed the cars of the raiding team to block the front, rear and SP1 personally blocked the right side of the said car. When SP1 introduced himself as the police, the driver of the said car, who was identified to be the first appellant attempted to escape by reversing and subsequently moving forward, to which had caused it to collide with the cars of the raiding team. The said car then managed to escape. SP1 had given chase and finally caught up with the said car. When the persons in the said car refused to open the door, the police broke the glass window on the driver's side of the car and SP1 saw the front passenger who was identified to be the second appellant, throw a black plastic bag out of the car which was subsequently recovered, and the contents were found to be drugs. The appellants elected to give unsworn evidence in the dock, to which they said that they arrived at the reservoir to meet a friend, while they were waiting, a Gen 2 car driven at great speed and collided into the front of the car. The collision pushed the car backwards which caused the said car to collide into a Waja parked at the rear, suddenly a group of strangers ran towards them and as they were fearful which was they drove off. The appellants then were apprehended by the same group of strangers when

they stopped to inspect the damage to the car. The appellants maintained that the plastic bag was in fact found outside the car they were in and were only aware of the plastic bag when it was shown to them by the police. The second sessions court judge who heard the defence case then convicted the appellant and sentenced them to an imprisonment term of eight years and ten strokes. The appellant submitted the following: (a) that the learned sessions court judge erred when she ruled that the prosecution had established a prima facie case at the end of the prosecution's case; (b) the sessions court judge erred in disbelieving the defence on two counts: (i) the sessions judge should have believed that it was the collision between the Gen 2 car and the said car which put the fear in the accused persons and caused them to flee from the scene; and (ii) the sessions judge had erred in concluding that this was an after-thought as the defence had suggested the defence to the prosecution witness, which according to counsel for the defence could be found in his cross-examination.

Held, dismissing the appeal:

(1) The first sessions court had acquitted the accused persons at the end of the prosecution's case on the ground that the prosecution had failed to establish a prima facie case. On appeal the High Court determined otherwise. The High Court had made a finding that the prosecution had established a prima facie case and that defence had to be called. By virtue of the principle of stare decisis, the learned sessions judge was legally bound to comply with the finding of the High Court that a prima facie case had been proven (see para 7).

(2) The learned sessions judge did not conclude that there was no collision between the police vehicles and the said car. If she did then she would obviously have fallen into error. This was because both the prosecution and defence witnesses testified that there was a collision between the said car and the police vehicles. The learned sessions judge assessed the damage to the said car. She found, after comparing the versions presented by the prosecution and the defence, that the damage to the said car was minimal and that the degree of damage was more consistent with the prosecution's version. She concluded that had the collision took place as what the defence contended, the damage would have been more extensive. The court was of the view that this finding to be logical and well-reasoned. There was no cause for the court to interfere with the sessions court judge's finding on this issue (see paras 17–20).

(3) The cross-examination referred to centred around whether the windows were closed or opened. This issue was relevant as if it was a closed window, the plastic bag could not be thrown out. However, the crux of the accused persons' defence which was that the black plastic bag was not thrown out by the second appellant but found outside the said car and merely shown to the accused was not suggested to any of the prosecution witnesses.

A And, in this respect, the learned sessions judge rightly concluded that the defence was not raised in the prosecution's case. The omission deprived the prosecution witnesses from testifying on this issue. The court also agreed with the learned sessions judge that in this case, the need to make the suggestion was made all the more necessary as the accused persons B had given an unsworn statement from the dock. This deprived the court of ascertaining the veracity of the defence by way of hearing the prosecution cross-examining the accused persons (see para 23).

(4) Learned counsel made no submission on the incorrectness of the C sentence imposed, in the circumstances the court found it appropriate to dismiss the appeal by the appellants (see para 24).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap sabitan dan hukuman yang dikenakan D oleh mahkamah sesyen. Perayu dipertuduhkan dengan pertuduhan dibawah s 12(2) Akta Dadah Berbahaya 1952 ('ADB') yang dihukum di bawah s 39A(2) akta yang sama dibaca bersama s 34 Kanun Keseksaan. Perayu pada mulanya dibebaskan oleh hakim mahkamah sesyen yang pertama yang mana pihak pendakwaan telah merayu, mahkamah tinggi mengetepikan keputusan E mahkamah sesyen dan memerintahkan bahawa pihak pendakwaan telah membuktikan satu kes prima facie dan perayu diperintahkan untuk membela diri. Fakta kes adalah bahawa SP1 telah mengetuai satu pasukan serbuan. SP1 telah menerima maklumat bahawa dua lelaki melayu terlibat dalam aktiviti dadah yang mana suspek menggunakan kereta dengan nombor pendaftaran F KAX 4173 ('kereta tersebut'). Bertindak di atas maklumat yang diterima, pasukan serbuan telah memulakan perjalanan ke tempat kejadian dalam tiga kereta. Pasukan serbuan menemui kereta tersebut diletakkan dan pasukan serbuan telah diarahkan untuk menghalang hadapan, tepi dan SP1 sendiri menghalang bahagian sebelah kanan kereta tersebut. Apabila SP1 G mengenalkan dirinya sebagai polis, pemandu kereta tersebut, yang dicam sebagai perayu pertama, telah cuba untuk melarikan diri dengan mengundurkan kereta tersebut dan kemudian memandu kehadapan, yang menyebabkan kereta tersebut berlanggar dengan kereta pasukan serbuan. Kereta tersebut kemudian berjaya untuk melepaskan diri. SP1 telah mengejar H kereta tersebut sehingga dapat/apabila individu didalam kereta tersebut enggan untuk membuka pintu, pihak polis telah memecahkan cermin tingkap bahagian pemandu kereta tersebut dan SP1 nampak penumpang hadapan, yang dicamkan sebagai perayu kedua, membuang satu beg plastik hitam keluar dari kereta tersebut yang kemudiannya ditemui, dan kandungannya I merupakan dadah. Perayu telah memilih untuk memberi keterangan tidak bersumpah didalam kandang, yang mana mereka menyatakan bahawa mereka sampai di empangan tersebut untuk berjumpa dengan kawan, semasa mereka sedang menunggu, satu kereta Gen 2 yang dipandu dengan laju telah melanggar di bahagian hadapan kereta tersebut. Pelanggaran tersebut telah

menolak kereta kebelakang yang menyebabkan kereta tersebut berlanggar dengan kereta Waja yang diletakkan di bahagian belakang, kemudian sekumpulan orang yang tidak dikenali telah berlari kearah mereka yang mneyebabkan mereka takut lari telah melarikan diri. Perayu yang kemudiannya ditahan oleh kumpulan orang yang tidak dikenali yang sama apabila mereka berhenti untuk memeriksa kerosakan kepada kereta. Perayu menegaskan bahawa beg plastik tersebut sebenarnya ditemui diluar kereta mereka dan mereka hanya mengetahui mengenai kewujudan beg plastik tersebut apabila ianya ditunjuk kepada mereka oleh pihak polis. Hakim mahkamah sesyen kedua yang mendengar kes pembelaan telah kemudiannya menyabitkan perayu-perayu dan menghukum mereka dengan pemenjaran selama lapan tahun dan sepuluh sebutan. Perayu menghujahkan bahawa: (a) hakim mahkamah sesysen yang terpelajar terkhilaf apabila memutuskan bahawa pendakwaan telah membuktikan kes prima facie di akhir kes pendakwaan; dan (b) hakim mahkamah sesyen terkhilaf apabila tidak mempercayai pembelaan di dua situasi: (i) hakim mahakamh sesyen sepatutnya mempercayai bahawa ianya merupakan pelanggaran antara kereta Gen 2 dan kereta tersebut yang membuat perayu-perayu takut dan melarikan diri dari tempat kejadian; dan (ii) hakim mahkamah sesyen terkhilaf dalam memutuskan bahawa ini merupakan satu pembelaan yang difikirkan kemudian kerana pembelaan telah mencadangkan kepada saksi pendakwaan, yang mengikut peguam perayu boleh dilihat dalam pemeriksaan balasnya.

Diputuskan, mengetepikan rayuan:

(1) Mahkamah sesyen pertama telah membebaskan tertuduh-tertuduh di akhir kes pendakwaan atas alasan bahawa pihak pendakwaan gagal untuk membuktikan kes prima facie. Di peringkat rayuan, mahkamah tinggi memutuskan sebaliknya. Mahkamah tinggi membuat dapatan bahawa pihak pendakwaan telah membuktikan kes prima facie dan tertuduh hendaklah dipanggil untuk membela diri. Selaras dengan prinsip stare decisis, hakim mahkamah sesyen terpelajar adalah terikat di sisi undang-undang untuk akur dengan dapatan mahkamah tinggi bahawa satu kes prima facie telah dibuktikan (lihat perenggan 7).

(2) Hakim mahkamah sesyen terpelajar tidak memutuskan bahawa tiada pelanggaran antara kenderaan polis dan kereta tersebut. Sekiranya beliau berbuat sedemikian, adalah jelas bahawa dia akan terkhilaf. Ini kerana kedua-dua saksi pendakwaan dan pembelaan telah memberi keterangan bahawa wujud pelanggaran antara kereta tersebut dan kenderaan polis. Hakim mahkamah seysen terpelajar telah mengamati kerosakkan pada kereta tersebut. Beliau dapati, setelah membandingkan versi pendakwaan dan pembelaan, bahawa kerosakan pada kereta tersebut adalah minima dan konsisten dengan versi pihak pendakwaan. Beliau memutuskan bahawa sekiranya pelanggaran berlaku seperti mana versi pembelaan, kerosakan akan lebih teruk. Mahkamah berpendapat bahawa dapatan ini

masuk akal. Tiada sebab untuk mahkamah campur tangan dengan dapatan hakim mahkamah sesyen berkenaan dengan isu ini (lihat perenggan 17–20).

(3) Pemeriksaan balas yang dirujuk adalah berkenaan dengan sama ada tingkap tertutup atau terbuka. Isu ini adalah relevan yang mana sekiranya tingkap tersebut tertutup, plastik beg tidak dapat dibaling keluar. Namun, asas pembelaan tertuduh adalah bahawa beg plastik hitam tersebut tidak dibaling keluar oleh tertuduh kedua tetapi ditemui di luar kereta tersebut dan hanya ditunjuk kepada tertuduh tidak dicadangkan kepada mana-mana saksi pendakwaan. Dalam perkara ini, hakim mahkamah sesyen telah dengan betul memutuskan bahawa pembelaan ini tidak dibangkitkan sewaktu kes pendakwaan. Ketinggalan ini telah menafikan saksi pendakwaan dari memberi keterangan atas isu tersebut. Mahkamah juga bersetuju dengan hakim mahkamah sesyen terpelajar dalam kes ini, bahawa keperluan untuk membuat cadangan adalah perlu kerana tertuduh telah memberi keterangan tidak bersumpah dari kandang. Ini telah menafikan mahkamah untuk menentukan kesahihan pembelaan melalui mendengar pemeriksaan balas pendakwaan (lihat perenggan 23).

(4) Peguam terpelajar tidak membuat apa-apa hujahan berkenaan dengan kekhilafan hukuman, dalam situasi ini, mahkamah mendapati bahawa adalah sesuai untuk menepikan rayuan tersebut oleh perayu-perayu (lihat perenggan 24).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101

Cases referred to

Periasamy s/o Sinnappan & Anor v Public Prosecutor [1996] 2 MLJ 557, CA (refd)

Burhanudeen bin Abdul Wahid (Burhan & Co) for the appellants.
Syarifah Syazwani bt Syed Hussin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Chan Jit Li JC:

[1] This appeal emanates from the Sessions Court at Sungai Petani. It has been filed at the instance of the accused persons. It is an appeal against both the conviction and the sentence imposed. For ease of reference, I shall refer to the parties as they were at the trial court.

[2] At the trial court, the learned sessions judge convicted the accused of the

following charge at the end of the defence:

> Bahawa kamu bersama-sama pada 8hb Oktober 2014 jam lebih kurang 2.30 petang di hadapan Watt Chai Dee Yar Ram, Bukit Pinang, dalam Daerah Kota Setar di dalam Negeri Kedah didapati di dalam kawalan kamu dadah berbahaya 5.19 gram iaitu 'Heroin' 4.69 gram dan 'Monoacetylmorphines' 0.50 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Sek 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Sek 39A(2) Akta yang sama dan dibaca bersama di bawah Sek 34 Kanun Keseksaan.

[3] The lower court trial was conducted by two sessions judges. The first sessions judge acquitted the accused persons. The prosecution appealed against this order of acquittal. The High Court hearing that appeal allowed the prosecution's appeal and directed that the case be remitted to the lower court for defence to be called.

[4] The second sessions judge heard the defence's case convicted the accused persons of the charge. The learned sessions judge then went on to sentence the accused persons to an imprisonment term of eight years and ten strokes.

[5] The approach to be adopted by the appellate court has been succinctly stated in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as he then was) held:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
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> In *Lim Kheak Teong v PP* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ (Malaya)) said (at pp 39–40):
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> > ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *Rex v Low Toh Cheng* [1941] 1 MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
>
> With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:
>
> (1) the views of the trial judge on the credibility of the witnesses;
>
> (2) the presumption of innocence in favour of the accused;

A (3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] B AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not C do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can D it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

[30] The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P'ng Hun Sun v Dato' E Yip Yee Foo* [2013] 6 MLJ 523, where the Court of Appeal held:

> *When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong* (see *China Airline Ltd v Maltran AirCorp Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara Bt A Kadir v China Airline Ltd v Maltran* F *AirCorp Sdn Bhd & Anor Appeal* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1.

The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:

G (a) by reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or

H (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

(d) in so far aside the judge has relied on manner and demeanour, there are I other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[6] En Burhanudeen bin Abdul Wahid ('En Burhan') submits that the

learned sessions judge erred when she held that the prosecution had established a prima facie case at the end of the prosecution's case.

[7] With the greatest of respect, I find this submission has no merit. As stated above, the first sessions judge had acquitted the accused persons at the end of the prosecution's case on the ground that the prosecution had failed to establish a prima facie case. On appeal the High Court determined otherwise. The High Court had made a finding that the prosecution had established a prima facie case and that defence had to be called. By virtue of the principle of stare decisis, the learned sessions judge was legally bound to comply with the finding of the High Court that a prima facie case. For her to revisit that finding as submitted by En Burhan would amount to error of appealable nature.

[8] Now, the brief facts of the prosecution's case is as follows. On the date of the incident, SP1 had headed a raiding team. SP1 had information that two male Malays were involved in drugs activities. The vehicle which the suspects were using was a Proton Saga Aeroback bearing registration No KAX 4173. Acting on information received, the raiding team travelled to the scene in three cars. The raiding team located the suspects' car parked at the reservoir at Bukit Pinang. SP1 directed one of the cars to block the front of KAX 4173. The second car was to block the rear of KAX 4173. SP1 personally used the vehicle he was travelling in to block the right side of KAX 4173.

[9] When SP1 introduced himself as the police, the driver of KAX 4173 attempted to escape by reversing. In doing so KAX 4173's driver collided with the police car bearing registration No PGE 2809. The driver of KAX 4173 next attempted to move forward. However, in doing so collided with car bearing registration No WMK 6870. After the attempts the driver of KAX 4173 managed to escape. SP1 and his team gave chase and finally caught up with KAX 4173 at Wat Siam Chaidee Yaram.

[10] When the persons inside KAX 4173 refused to open the door, the police broke the glass window on the side of the driver of KAX 4173. At the same time SP1saw the front passenger throw a black plastic bag out of the car. The black bag was recovered and the contents were found to be drugs.

[11] SP1 identified the driver as Mohd Syaakir Badri bin Mod Noor, the first accused and the passenger as Syed Alwi, the second accused.

[12] Both the accused persons elected to give an unsworn statement from the dock. They share a common defence. According to the accused persons, they had arrived at the reservoir to meet a friend. But as the friend had yet to arrive, they waited in the parked car. While they were parked there, a Gen 2 car driven at a great speed came from the front. This Gen 2 car collided into the

front of their car. The collision momentum then pushed their car backwards. As such their car KAX 4173 collided into a Waja parked at their rear.

[13] All of a sudden a group of strangers ran towards them. Being fearful, they drove off. They then stopped at the temple (*wat*) to inspect the damage to their car. It was then that the same group of strangers apprehended them.

[14] Both the accused denied knowledge of the black plastic bag which contained the drugs. Both the accused maintained that the plastic bag was in fact found outside the car they were in. They were aware of the bag only when it was shown to them by the police.

[15] The learned sessions judge disbelieved them. She further held that the joint defence was an afterthought as the version was not put to the prosecution.

[16] It is En Burhan's submission that the learned sessions judge erred in disbelieving the defence on two counts. The first error is that the learned sessions judge should have believed that it was the collision between the Gen 2 car and KAX 4173 which put the fear in the accused persons and caused them to flee from the scene.

[17] After perusing the grounds of judgment, I note some inaccuracies in the learned defence counsel's submission. The learned sessions judge did not conclude that there was no collision between the police vehicles and KAX 4173. If she did then she would obviously have fallen into error. This is because both the prosecution and defence witnesses testified that there was a collision between KAX 4173 and the police vehicles.

[18] However, it is the prosecution's case that KAX 4173 collided into the police vehicle at its rear when the driver of KAX 4173 attempted to escape. Seeing that the rear escape route was blocked, the driver of KAX 4173 moved forward and collided into the police vehicle in its front.

However, it is the defence's case that the Gen 2 (which is one of the two police vehicles) had approached KAX 4173 at a high speed before colliding into KAX 4173. This frontal impact had pushed KAX 4173 backwards causing KAX 4173 to collide into the police vehicle which was at the rear of KAX 4173.

[19] The learned sessions judge assessed the damage to KAX 4173. She found that the damage to KAX 4173 was minimal and that the degree of damage was more consistent with the prosecution's version. She concluded that had the collision took place as what the defence contended, the damage would have been more extensive. This is evident in her grounds of judgment which

appears as follows:

> [15] Saya mendapati pembelaan OKT 1 dan OKT 2 adalah tidak kredible dan tidak boleh dipercayai. Ini adalah berdasarkan kenyataan mereka yang menyatakan terdapat sebuah kereta Proton Gen 2 dari arah hadapan yang dipandu dalam keadaan laju dan merempuh bahagian hadapan kereta mereka dan akibat dari rempuhan tersebut kereta mereka telah mengundur ke belakang dan menghentam sebuah kereta Waja yang kebetulan berada di bahagian belakang. Versi yang dicadangkan oleh OKT 1 dan OKT 2 kepada SP1 adalah kereta mereka bergerak ke belakang dan bersentuh dengan kereta Waja yang berada di belakang. Dengan itu saya mendapati kenyataan bersumpah mereka adalah bercanggah dengan versi mereka semasa kes di peringkat pendakwaan. Tambahan pula jika kereta yang dinaiki OKT 1 dan OJKT 2 menghentam kereta Waja pasti terdapat kerosakan kereta mereka di bahagian belakang kereta mereka kerana perkataan 'menghentam' merujuk kepada satu perlanggaran yang kuat berbanding 'bersentuh'. Namun jika diteliti pada gambar kerosakan kereta OKT 1 didapati tiada kerosakan di bahagian belakang kereta tersebut. Oleh yang demikian saya memutuskan keterangan OKT 1 dan OKT 2 berkenaan perkara ini adalah tidak benar.

[20] I am of the view that this finding to be logical and well-reasoned. I can see no cause for me to interfere with her finding on this issue.

[21] In the defence, both the accused persons had stated that the black plastic bag containing the incriminating drugs was not thrown out by the second accused but was picked up by the police from outside and shown to them. The learned sessions judge made a finding that this defence was an after thought in the following manner:

> [17] ... Di dalam kes di hadapan saya ini, saya mendapati kenyataan kedua-dua OKT berkenaan plastic hitam yang didakwa ditunjukkan kepada mereka oleh salah seorang anggota polis adalah satu fakta yang sangat penting dan perlu dicadangkan kepada pihak pendakwaan semasa kes pendakwaan dengan itu pihak pendakwaan mempunyai peluang untuk mencabar keterangan tersebut.

[22] En Burhan submits that the learned sessions judge erred in concluding that this was an after-thought as the defence had suggested the defence to the prosecution witnesses. The suggestion of the defence, according to En Burhan, can be found in his cross-examination which appears as follows:

> *Keterangan SP1 sewaktu pemeriksaan balas:*
>
> S: Mengikut S1 keempat cermin tertutup?
>
> J: Tiga cermin tutup dan satu buka.
>
> S: P1B, satu tingkap buka 3 tingkap tutup di tempat X keadaan sama juga?
>
> J: Sebelah kiri kereta tu tak Nampak samada buka atau tutup.
>
> S: SI hampiri dari kanan taknampak sebelah kiri?

J: Betul.

S: *SI tak nampak cermin kiri buka atau tutup?*

J: *Tak setuju.*

S: *Semasa sampai di tempat X di IPD setuju dengan saya semua tingkap tutup?*

J: *Tak setuju.*

S: Daripada arah di mana SI berada SI tak boleh Nampak penumpang telah buang sesuatu dari kenderaan tersebut?

J: Tak setuju.

S: Saya cadangkan dari keterangan yang SI kedudukan kenderaan P1B bahawa SI tak boleh Nampak perlakuan penumpang yang ada dalam kenderaan tertuduh?

J: Tak setuju.

[23] I find that the cross-examination referred to by En Burhan is centres around whether the windows were closed or opened. This issue is relevant as if it is a closed window, the plastic bag cannot be thrown out. However, the crux of the accused persons' defence which is that the black plastic bag was not thrown out by the second accused but found outside KAX 4173 and merely shown to the accused was not suggested to any of the prosecution witnesses. And, in this respect, the learned sessions judge rightly concluded that the defence was not raised in the prosecution's case. The omission deprived the prosecution witnesses from testifying on this issue. I also agree with the learned sessions judge that in this case, the need to make the suggestion was made all the more necessary as the accused persons had given an unsworn statement from the dock. This deprived the court of ascertaining the veracity of the defence by way of hearing the prosecution cross-examining the accused persons.

[24] In the final analysis I find that the learned sessions judge did not commit any error that warrants appellate interference. Learned counsel for the accused persons made no submission on the incorrectness of the sentence imposed. In the circumstances, I find it appropriate to dismiss the appeal by the two accused persons on both the order of conviction and the sentence imposed.

Appeal dismissed.

Reported by Izzat Fauzan